Filed 11/21/13 In re Kevin G. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re KEVIN E. G., a Person Coming Under the Juvenile Court Law.	B247613 (Los Angeles County Super. Ct. No. CK87594)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KEVIN M. G., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Veronica S. McBeth, Judge. Affirmed.

———

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

———

Kevin M. G., the alleged father of Kevin E. G., appeals from the order terminating his parental rights, arguing that we should reverse the order because he did not receive paternity testing. We agree with the alleged father that he should have received paternity testing but conclude that on this record the error in failing to ensure the testing occurred was not prejudicial. We, therefore, affirm the order terminating parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

On April 28, 2011, the Department of Children and Family Services (DCFS) filed a petition under Welfare and Institutions Code section 300[1] as to the child, who then was three days old, alleging: (1) "On 04/25/2011, the child . . . was born suffering from a detrimental condition consisting of a positive toxicology screen for amphetamine. Such condition would not exist except as the result of unreasonable acts by the child's mother . . . , placing the child at risk of physical harm." (2) "The child['s] . . . mother . . . has a history of illicit drug abuse and is a current abuser of amphetamine and methamphetamine, which renders the mother incapable of providing regular care for the child. The mother used illicit drugs during her pregnancy with the child." (3) "The child['s] father . . . failed to provide the child with the necessities of life including food, clothing, shelter and medical care. The father's whereabouts [are] unknown."

At the detention hearing, also on April 28, the juvenile court found a prima facie case for detaining the child, no reasonable means to protect him without removal and reasonable efforts to prevent or eliminate the need for removal. The court vested temporary placement and custody with DCFS for placement of the child in foster care and granted mother monitored visitation of two to three times per week for two to three hours per visit. Mother reported Kevin M. G. as the child's biological father, although no father had been identified on the birth certificate, and said he was incarcerated at an unknown location. The court found Kevin M. G., who was not present, an alleged father.

The juvenile court adjudicated the petition on June 21 and declared the child a dependent of the court under section 300, subdivisions (b) and (g). The court granted

---

[1] Statutory references are to the Welfare and Institutions Code.

mother reunification services and continued her monitored visitation of two to three times per week for two to three hours per visit. It granted no reunification services for the alleged father, who, according to DCFS, did not respond to a request from an investigator for a telephonic interview. In August, when he was approximately three-and-a-half months old, the child began placement with a prospective adoptive family.

In a status review report, dated December 20, DCFS indicated that, six times between July 14 and December 5, the social worker had contacted the prison where the alleged father was residing "in regards to [his] progress and estimated time of release. However [the social worker] has been unable to contact a case manager or an agent or receptionist to obtain any information." DCFS reported that the alleged father was serving a four-year prison term, which began in November 2010 during mother's pregnancy.

DCFS also reported that the alleged father had "contacted DCFS on 07/14/2011, 08/08/2011 and 09/18/2011 via written letters. [The alleged father] has stated in the 08/08/2011 [letter] that he would like a paternity test completed. [The social worker] sent a contact letter informing [him] that due to him not being at the initial hearing he does not have an attorney to contact to set up a paternity test. On 09/18/2011 [he] stated that he does not want the Court to have him as 'an alleged father[]'[;] therefore he is requesting a paternity test. [The alleged father] also reported that there are not any programs available at the . . . [p]rison for hi[m] to enroll in any programs. [The social worker] has sent [the alleged father] monthly photos of the child . . . ." The alleged father also said in one letter that he had a family friend who would be willing to adopt the child and in another letter that, if a paternity test determined him to be the child's father, that would push his family to step up. A letter from the alleged father dated December 11 and received by the juvenile court on December 20 stated, "On 12-20-11 my son has a six month review hearing. I am requesting that I have a D.N.A. test taken for myself and my son." On February 17, 2012, the court filed a letter from the alleged father in which he stated, "I am currently serving a four[-]year term in the California Department of Corrections. I am requesting a D.N.A. test so that I can show my family that I am the

father of [the child]. I beli[e]ve by tak[]ing this test and proving that I am the father my family will step up and take my son in."

At a contested review hearing under section 366.21, subdivision (e), on May 7, the court terminated mother's reunification services. The court noted that the alleged father "is asking for a DNA test" but did not further address the matter. It set a progress hearing for July 11 and a section 366.26 hearing for September 4.

The parties acknowledged at the progress hearing on July 11 that the alleged father had requested paternity testing and that the juvenile court had ordered it. The court then stated that it was ordering the testing.[2] On September 4, the court continued the section 366.26 hearing to October 30, noting that the alleged father had not been noticed properly, and said "in the meantime we can get the DNA." On September 17, the alleged father submitted to the court a request to make the child available for DNA testing. DCFS, on October 26, submitted information to the court indicating that the alleged father had received personal service of the October 30 hearing date and "is currently in prison and signed his right to waive his appearance." The alleged father requested appointment of an attorney to represent him at the October 30 hearing. On October 30, the court appointed counsel for the alleged father for the purpose of a special appearance at the section 366.26 hearing. The court continued the section 366.26 hearing to December 5 for appointed counsel to contact the alleged father. On December 5, appointed counsel indicated that he had been trying to contact the alleged father but had not been successful in reaching him. The court thus continued the section 366.26 hearing to January 24, 2013 to allow appointed counsel further time to communicate with the alleged father. The alleged father waived his right to attend the January 24 hearing and stated that he did not wish to attend the hearing. He requested that an attorney appear for him.

At the section 366.26 hearing on January 24, the alleged father's appointed counsel argued that paternity testing should have occurred and, if the alleged father were

---

[2] By this time, mother, with a different alleged father, had a second child, who was born with multiple health issues.

determined to be the child's biological father, his relatives should have been evaluated for placement. The court denied additional time for paternity testing, stating that "[h]e is an alleged father. He would have never been offered any programs because he is an alleged father and because he has four years in prison and whether he would not be able to be out for a decent time to even rise to the . . . presumed father level. So if it was error, it was harmless error at this time. You have your right to an appeal. At this point father . . . is an alleged father. He has waived every right to be here when he was given the opportunity to. I did appoint counsel to make sure, but as I look at it, no matter what would have happened and that's the reason I say harmless error and it would not have been any different. The paternal relatives who were aware of the child were not able for whatever reason to take the child and that the child is placed in a safe home for almost his entire life and it would absolutely not be in his best interest to disrupt everything for someone who is an alleged father, who would never have been given family reunification services and have never risen to the level of presumed father." The court then terminated the mother's and the alleged father's parental rights, freeing the child for adoption by his foster family. The alleged father filed a timely notice of appeal. (See *In re X.V.* (2005) 132 Cal.App.4th 794, 800 [order terminating parental rights appealable]; § 395, subd. (a)(1).)

DISCUSSION

The alleged father contends that the failure to obtain paternity testing was erroneous and prejudicial and that, as a result, the order terminating parental rights should be reversed and paternity testing should be ordered. DCFS argues that, although the failure to obtain paternity testing was error, it was harmless in this case. We agree with DCFS.

An alleged father has "limited due process and statutory rights. 'Alleged fathers have less rights in dependency proceedings than biological and presumed fathers. [Citation.] An alleged father does not have a current interest in a child because his paternity has not yet been established. [Citation.]' [Citation.] As such, an alleged father is not entitled to appointed counsel or reunification services. [Citations.] [¶] Due

process for an alleged father requires only that the alleged father be given notice and 'an opportunity to appear and assert a position and attempt to change his paternity status. [Citations.]' [Citation.]" (*In re Paul. H.* (2003) 111 Cal.App.4th 753, 760.)

Section 316.2 outlines the statutory procedure that protects the limited rights of an alleged father. Specifically, section 316.2, subdivision (b), sets forth the juvenile court's duties to an alleged father: "[E]ach alleged father shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the father of the child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Council form Paternity—Waiver of Rights (JV-505) shall be included with the notice. . . ." (See also Cal. Rules of Court, rule 5.635(g).)

In this case, nothing in the record demonstrates that the alleged father was provided with the section 316.2, subdivision (b), notice or the Judicial Council form. Nevertheless, he requested, through the social worker, the juvenile court and later his appointed attorney, paternity testing. He did not receive such testing. The failure to provide him with paternity testing to attempt to change his paternity status from that of an alleged father was error. (*In re Paul H.*, *supra*, 111 Cal.App.4th at p. 761; *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1118; Cal. Rules of Court, rule 5.635(g).)

The error, however, was harmless. (See *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1122 [harmless error analysis applies to failure to give alleged father proper notice under statute and rule of court].) Even if the alleged father had been determined to be the biological father of the child, the outcome of the dependency proceedings would not have been different. The alleged father was incarcerated before the child's birth and remained incarcerated through the dependency proceedings. He was not listed on the child's birth certificate, had not met the child and did not provide financial support for the child. He waived his right to appear at two hearings, including the section 366.26 hearing, even after counsel had been appointed for him. He also has an extensive criminal history. The alleged father does not argue that he qualified as a presumed father, and the juvenile court

stated on the record that it would not have granted him reunification services even if he were the child's biological father. Nor does the alleged father's argument of prejudice based on statements he made that a family friend or one of his relatives might have taken in the child if he were determined to be the biological father have merit. The alleged father did not provide any names or specifics that made placement with a family friend or relative of his a realistic possibility, particularly given the child's placement in a prospective adoptive home. The one paternal relative mentioned in the proceedings, a paternal uncle, was reported by DCFS to have come to a visit with mother "smelling 'like weed'" and asked to wait outside, which was followed by mother ending the visit early.

Contrary to the alleged father's contention, this case is not like *In re Paul H.*, *supra*, 111 Cal.App.4th at pp. 761-762, in which "[t]here was minimal information before the juvenile court regarding [the alleged father's] circumstances and background. It appears the social worker never interviewed [the alleged father] and provided no information to the juvenile court concerning his viability as a custodian for the minor." The appellate court thus concluded, "We cannot assume, based on this dearth of information, that had [the alleged father] established his paternity and been appointed counsel, he would not have received reunification services. [Citations.]" (*Id*. at p. 762.) As a result, the appellate court held that the alleged father was prejudiced by the juvenile court's failure to follow the procedures set forth by statute and rule. (*Ibid*.) In this case, however, the circumstances of the alleged father detailed in the record show that the failure to provide him the required notice, and follow through with paternity testing, did not affect the outcome of the dependency proceedings.

This case is much more in line with *In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1124 in which the appellate court concluded that the failure to provide the alleged father the required notice was harmless based on information in the record that the alleged father was incarcerated since the child was two days old and for most of the dependency proceedings, was not named on the child's birth certificate, did not financially support the child, was not married to the child's mother and did not attempt to marry her and had a prior violent felony conviction. According to the appellate court,

"[i]t is inconceivable that the [juvenile] court would have removed [the child] from his stable foster-preadoptive placement to place him with a father he did not know who had only recently been released from prison. [Citations.] Whether or not [the alleged father] sought to change his paternity status, the course of his relationship with [the child] and of the dependency case would not have been different. On this record, we conclude [the alleged father] was not prejudiced by the juvenile court's failure to comply with the notice requirements" for an alleged father. (*Ibid*.) The same result of no prejudice is warranted under the circumstances of this case.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.